

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 LEE E. BUCHWALD, as Chapter 7
4 Trustee for Magnesium
5 Corporation of America and
6 Related Debtor, Renco Metals,
7 Inc.,

8 Plaintiff,

9 v.

13 CV 7948 (AJN)
Trial

10 THE RENCO GROUP, INC., a
11 Delaware corporation, et al.,

12 Defendants.

13 New York, N.Y.
14 February 26, 2015
15 9:20 a.m.

16 Before:

17 HON. ALISON J. NATHAN,

District Judge

18 APPEARANCES

19 BEUS GILBERT, PLLC
20 Attorneys for Plaintiff

BY: LEO R. BEUS
SCOT C. STIRLING
ROBERT STIRLING
MALCOLM LOEB

21 KAYE SCHOLER LLP
22 Attorneys for Defendants

BY: H. PETER HAVELES, JR.
JEFFREY A. FUISZ

23 -and-

24 PARK JENSEN BENNETT LLP
BY: TAI H. PARK
STEVEN C. BENNETT

1 (Trial resumed; jury not present)

2 THE COURT: Upon reflection as to the jury's request,
3 let me get the note in front of me. The note, Court Exhibit
4 15, which asks for the solvency opinions for Frank and
5 Grabowski, upon reflection and after reading your letters this
6 morning, this is what I decided I am going to say: This is a
7 departure from what was requested of me yesterday.

8 You've asked for the solvency opinions of Frank and
9 Grabowski. Their expert opinions were put before you at trial
10 through their testimony. During that testimony they referenced
11 written reports. Those reports themselves are not in evidence.
12 Instead, as noted, their expert opinions are in evidence via
13 their testimony and any exhibits admitted during their
14 testimony. Assuming that's what you are seeking, the lawyers
15 have pulled together the direct, cross, and redirect
16 examinations of both Frank and Grabowski, and I am sending that
17 back with you now. And to the extent that you are interested,
18 the exhibits that were admitted during their testimony you
19 have, and they were, and I'll just read the numbers as to what
20 they are, all of them.

21 What are the numbers?

22 MR. HAVELES: We have a list we gave to your Honor.

23 When you say all of them, I am not clear. Is that
24 addressing the issue that was raised in my letter to mean that
25 particular exhibit will also be on those? Because we have two

1 versions, one with, one without the numbers.

2 THE COURT: All of the exhibits that were admitted
3 during any of the testimony of the experts.

4 MR. HAVELES: Okay. Thank you, your Honor.

5 THE COURT: Including the one that you asked not to be
6 sent back to them, though obviously they have it. Because it
7 came in during their testimony but was not inquired about.

8 MR. HAVELES: Rather than reading it and messing it
9 up, I'll hand you the actual typed list, your Honor, which
10 includes the exhibit number in question.

11 THE COURT: Mr. Stirling, you've looked at that list?

12 MR. S. STIRLING: Yes, your Honor, we have shared
13 these lists.

14 THE COURT: Yes. Thank you very much.

15 MR. HAVELES: We have the testimony, your Honor. We
16 have prepared the Grabowski testimony. Mr. Stirling has
17 prepared the Frank testimony. Last night we exchanged the
18 versions showing the redactions and we each signed off on the
19 extent of the redactions. There were no disagreements.
20 Everyone was happy with what had been done.

21 Do you want us to hand that to Ms. Nunez right now,
22 your Honor?

23 THE COURT: Yes, please.

24 Does anyone have a preference as between me reading to
25 them the full list of exhibits or simply giving them the pieces

1 of paper that you've handed me, any preference?

2 MR. HAVELES: I would give them the list, your Honor.

3 MR. S. STIRLING: I agree.

4 THE COURT: It would be efficient. Thank you. We
5 will do that.

6 The only modification then to what I'll say is just at
7 the end and to the extent you are interested, the exhibits that
8 were admitted during their testimony that you have a list of
9 them, I'm also giving them with the testimony.

10 MR. HAVELES: The one clarification I would
11 respectfully suggest, your Honor, because there were exhibits
12 that were used that had been previously admitted, so it also
13 includes exhibits that were addressed during the testimony but
14 had been admitted prior to the examination.

15 THE COURT: That's fair enough. And I'll say, as
16 noted, their expert opinions are in evidence via their
17 testimony, and any exhibits admitted or discussed with them
18 during their testimony.

19 MR. HAVELES: Thank you, your Honor.

20 MR. S. STIRLING: Yes.

21 MR. HAVELES: I have one other issue, if I may, your
22 Honor.

23 Your Honor, this morning's New York Post had an
24 article, and I'll hand it up to your Honor and Mr. Stirling,
25 had an article with the headline: Jury weighing Ira Rennert's

1 \$700 million dollar fate, and the \$700 million, which was never
2 a number given to the jury, is attributed to an undisclosed
3 source in the course of the article. We are concerned about,
4 given the Post is a rather commonly read newspaper in this
5 city, about the potential, because we have not told people to
6 not read newspapers at all, for the potential, given the
7 headline, prejudicing the jury with extra judicial comments in
8 the press. And we think that a cautionary instruction to the
9 jury about there may be newspaper articles during the course of
10 the week and the jury should avoid any reference to newspapers
11 while this is going on. And if they inadvertently see
12 something they should understand that what may be in the press
13 is not necessarily accurate or a correct recitation of what is
14 before them and it should be disregarded.

15 THE COURT: I am happy to add that to elaboration to
16 my instruction. I think the thing to do would be to do that at
17 the end of the day, if we are not done, because they will be in
18 here all day.

19 MR. HAVELES: My concern is if they read the Post this
20 morning, because it was on the website late last night and it
21 was in the paper for the morning edition, to the extent anyone
22 reads the Post in the morning, there is the possibility they
23 would have seen this, given the prominence of the headline.
24 I'm concerned about the inadvertent impact it might have on
25 today's deliberations, particularly given the number used in

1 the headline, which was not a number used during the course of
2 the trial.

3 THE COURT: I am not sure which would be worse. If it
4 were a number used during the course of the trial, you'd have
5 the same concern, I imagine.

6 MR. HAVELES: If it was in the trial, either it would
7 have been admitted or not. No one has asked for a gag order.
8 This is a normal paper. We told people not to go out and do
9 any research. Now, this is something in a routine daily
10 newspaper that many New Yorkers read. If it was in an obscure
11 journal, it was like the Observer has picked up some stories, I
12 wouldn't worry because no one reads the Observer. Something
13 like the Post, that's a different issue.

14 THE COURT: You want me to do this when they come in?

15 MR. HAVELES: Yes, your Honor.

16 THE COURT: Tell me your request again.

17 MR. HAVELES: My request is to remind the jury that
18 they should not be looking at anything they see in the news or
19 newspapers or social media or on the web regarding this case
20 and remind them that things that may be reported are not part
21 of the record and may not be accurate and should be
22 disregarded.

23 THE COURT: Mr. Stirling.

24 MR. S. STIRLING: Your Honor, I have no objection to
25 your handling it as you see fit.

1 THE COURT: Thank you.

2 I will do a version of that.

3 MR. HAVELES: Thank you, your Honor.

4 THE COURT: We are just checking on our numbers. As
5 soon as we get 10, we will bring them out to give this back to
6 them.

7 Anything else?

8 MR. HAVELES: Nothing on this side, your Honor.

9 MR. S. STIRLING: Nothing.

10 THE COURT: I'll step down until we have our 10.
11 Thank you.

12 (Recess)

13 THE COURT: We do have all of our jurors. We will
14 bring them in in a moment, as soon as they are ready.

15 While we have a moment, for your planning purposes, to
16 the extent that there are posttrial motions, I am not going to
17 extend the 28 from judgment day deadline. That will be the
18 deadline for filings with two weeks for opposition, one week
19 for reply.

20 MR. HAVELES: Your Honor, from a more micro calendar
21 issue, are we still thinking that 12:30 is the luncheon recess?

22 THE COURT: I will have lunch brought in for them at
23 12:30.

24 (Jury present)

25 THE COURT: Good morning, members of the jury. To

1 complete the response to your request from yesterday, when you
2 had sent a note asking for exhibits for tomorrow, solvency
3 opinions for Frank and Grabowski, as just noted, you have asked
4 for the solvency opinions of Frank and Grabowski. Their expert
5 opinions were put before you at trial through their testimony.
6 During that testimony they did reference written reports.
7 Those reports themselves are not in evidence. Instead, as
8 noted, their expert opinions are in evidence via their
9 testimony and any exhibits admitted or discussed with them
10 during their testimony. So assuming that's what you are
11 seeking, the lawyers have pulled together the direct, cross,
12 and redirect examinations of both Frank and Grabowski, and I
13 have that and I am going to send that back with you now.

14 And to the extent that you are interested, we also
15 have a list of the exhibits that were admitted or discussed
16 with Frank and Grabowski, that were admitted or discussed with
17 them during their testimony. You have those exhibits. But to
18 the extent it's helpful, or what you are looking for, going
19 back with you along with the testimony are the list of
20 exhibits.

21 I'll give those to Ms. Nunez to give to you on your
22 way back.

23 I also did have one note. As I've discussed
24 throughout, and I am confident you've been faithful to the
25 importance of doing no research of any kind regarding the case,

1 everything that you need to know about the case is what's come
2 in evidence here. A corollary of that, to the extent you were
3 to inadvertently see something, that it came to you through the
4 press or other ways, you should, of course, disregard it. To
5 the extent you have seen anything in that regard, of course,
6 you should put it out of your mind. It's not evidence, not
7 reliable, not part of the case. Everything which you are
8 permitted to base your decision on is what's been admitted in
9 evidence in this case.

10 With that, I'll send you back and we will have lunch
11 brought in for you at 12:30. Thank you very much.

12 (Jury deliberations resumed; time noted: 9:55 a.m.)

13 THE COURT: Just to complete that point, I usually
14 give the lawyers a lunch, an hour for the lunch. But given the
15 frequency with which notes have come out, I do want to keep
16 that shorter, so let's take a 40-minute lunch break.
17 Otherwise, please be available so we can respond to notes as
18 promptly as possible.

19 Anything else to address at this time?

20 MR. HAVELES: No, your Honor.

21 THE COURT: We will wait to hear from the jury. Thank
22 you.

23 (Recess pending verdict)

24 THE COURT: We received a note which we will mark as
25 16. The note says: In order to answer No. 6, we need to know

1 the total amount received for A through G: A, Renco Group; B.
2 Ira Rennert; C, Legge; D, Thayer; E, Ogaard, F, Brown; G,
3 Kaplan. Plus new paper, please and thank you, which I will
4 direct my deputy.

5 I'll hear your proposals for response.

6 MR. HAVELES: We need to do some number crunching to
7 some extent for some of them, your Honor. The one thing that
8 there is no dispute on, there was no direct transfer to
9 Mr. Rennert. As to that I believe the number is zero. But for
10 the others we'd have to sit down and add numbers up.

11 THE COURT: Why don't you sit and think a little bit,
12 come up with a proposal. I am going to sit and think for a
13 little bit. It's an unusual question. And I'll want to give
14 you a few moments to formulate how you would like me to
15 respond, including doing whatever you think is necessary to
16 respond.

17 I'll come back in a few minutes and we can all noodle
18 a bit.

19 (Recess pending verdict)

20 THE COURT: Suggestions.

21 MR. HAVELES: Your Honor, the jury is asking us to do
22 its fact finding with respect to the amount of No. 6 because
23 there is no readily available information without us doing what
24 would be the jury's work. We think it's inappropriate to
25 answer the question and say they have to go back and rely on

1 the evidence.

2 THE COURT: Give me your specific proposal.

3 MR. HAVELES: My proposal would be to advise the jury
4 that this is an issue for it to determine and must review the
5 evidence to reach a determination as to what the evidence in
6 the record shows as to each of those amounts to each of the
7 parties about whom they have asked.

8 MR. S. STIRLING: Your Honor, I think we can refer
9 them to, first, agreed facts where these numbers are identified
10 in Exhibit 2792 and in a couple of other exhibits where the
11 information can be found. The numbers are not in controversy
12 and the information is simply a matter of -- it's a matter of
13 giving the jury an answer to the question about where that
14 information is in the exhibits that they have, including agreed
15 facts.

16 MR. HAVELES: Your Honor, they asked that question
17 yesterday and we pointed them to the various documents. And
18 now they are asking us for the numbers. That's the issue.
19 Tell us what numbers to fill in on the verdict form.

20 THE COURT: I agree that we are not going to do that
21 and that's not what actually Mr. Stirling is suggesting. Let's
22 try to be responsive.

23 I think the question on the table is whether to say
24 simply, what they are asking is part of their task. And based
25 on the information that they have and the evidence and the

1 like, it's for them to determine, versus that with pointing
2 them to any exhibits that do or don't, I suppose, contain
3 information from which those numbers can be derived.

4 I agree that when you first stood up and suggested
5 doing the math, it was not immediately apparent to you that
6 that was inappropriate, but I agree with you now that it's
7 inappropriate.

8 Really the question is to make their task manageable
9 whether there are some set of documents that appropriately they
10 should be pointing to.

11 MR. HAVELES: As I said, your Honor, yesterday they
12 specifically asked for that. We told them the specific
13 documents.

14 THE COURT: How about we point them again to the
15 documents?

16 MR. HAVELES: We can point them collectively to the
17 same documents we did yesterday, your Honor. Let me just pull
18 up the transcript to get the answer we gave them, if I may.

19 Your Honor, yesterday, and I'm referring to the
20 discussion that begins on page 2964, all the way over to the
21 advice we gave the jury, that your Honor gave the jury on pages
22 2971 through 72.

23 THE COURT: Just one second.

24 Mr. Haveles, you said 2964.

25 MR. HAVELES: The discussion, you gave us a break to

1 think about it and then we started to have a dialogue when we
2 came back on 2964 and the pertinent discussion begins as to
3 these documents, your Honor, on page 2966 through 2970. And
4 then the advice that you gave the jury is reflected starting on
5 line 21 of 2971 through line 13 of the next page.

6 THE COURT: Some of those numbers were wrong and then
7 we recorrected later and then added to them, if I'm
8 remembering. Is this the place where that was?

9 MR. S. STIRLING: In part, yes.

10 MR. HAVELES: Those were the balance sheet, things for
11 the MagCorp balance sheets. This is referencing them to
12 certain 10-Ks and some stipulated facts, your Honor, or
13 referring to them. We corrected that error before we got to
14 this note, your Honor.

15 THE COURT: Can you point me again to where you think
16 it's contained.

17 MR. HAVELES: The advice you gave the jury?

18 THE COURT: Yes.

19 MR. HAVELES: There was a long discussion.

20 THE COURT: No.

21 MR. HAVELES: Beforehand, the advice you gave the jury
22 as to this gentleman starts at 2971, line 21, carrying through
23 to -- actually, your Honor, it starts on 2972, line 3 through
24 13. This is in response to their question about documents
25 regarding dividends, and we had a dialogue about both dividends

1 and net worth appreciation payments in the preceding pages,
2 your Honor.

3 THE COURT: At base the view as to what documents
4 contain information to answer this question is to be found at
5 2090 and Exhibit 8330 at page 0039 and 8382 at page 0043. And
6 what I said you can look here for the total amount paid in a
7 fiscal year with respect to the three individuals, Legge,
8 Kaplan, and Thayer. And you may also -- it says: You may also
9 give them what you have asked for, what to look to, Exhibit
10 2792. I think the language there, and you may also look to
11 Exhibit 2792, which is the stipulated facts, agreed facts and,
12 in particular, pages 19 to 22.

13 Setting aside the language for a moment, Mr. Stirling,
14 do you agree these are the exhibits that could readily be
15 pointed to?

16 MR. S. STIRLING: Your Honor, I think there are other
17 exhibits that should be identified for the jury. The question
18 they are asking today --

19 THE COURT: What exhibits?

20 MR. S. STIRLING: Very well. In addition to 2090 and
21 2792, we would suggest 2074, 1998 10-K at page 43; Exhibit
22 2033, page 11; and then the net worth agreements for the
23 individual defendants: Legge, 2181; Brown, 2183; Ogaard, 2202;
24 Thayer, 8057; and Kaplan, 8098.

25 THE COURT: What is your reaction to the fuller list?

1 Is it just the same reaction or is it any different?

2 MR. HAVELES: It's twofold. One, I don't think it's
3 appropriate just to give them the net worth appreciation
4 agreements because they are the contracts.

5 My view is, it's the jury's job to decide what
6 evidence it wants to look at. They can't come and say, how
7 should we determine the numbers when we say look at these
8 exhibits. That, in effect, becomes a mini closing.

9 I believe this is an inappropriate response telling
10 them, this is the evidence you should consider to answer a
11 particular verdict question. I believe we should not give them
12 any information. Before they asked for particular exhibits, we
13 gave them the information where they are looking for things,
14 just help us sort through things.

15 Now this is a question specifically addressed to how
16 should we answer one of the interrogatories. And it's
17 inappropriate to say, well, look at these things and you can
18 find all the numbers you need. That's not the task of a jury
19 note here. And I believe it now becomes the jury asking us to
20 help fill in the void for their fact finding. If either side
21 failed to bring the jury's attention to certain evidence or
22 tell the jury how to answer the questions, that's a failure of
23 closing argument and it can't be resolved by answering a note
24 to a jury question, which is specifically what this note seeks
25 to do.

1 And I strongly urge the Court to say that this is an
2 issue of fact finding, the jury must review the evidence that
3 it received to determine what the answer is.

4 But separate and apart from that, we spent a lot of
5 time yesterday going over all of these things and these are the
6 documents that we all identified contained the information. I
7 haven't looked at 2074, but I would strongly disagree with him
8 telling to start looking at the net worth agreements because
9 that only further amplifies the point of my basic objection.
10 We are telling the jury what evidence it should consider to
11 make an ultimate finding of fact and, I respectfully submit,
12 your Honor, that just crosses the line of what the jury may
13 request of counsel and the Court to help them with.

14 THE COURT: I will say I do tend to agree. I was
15 surprised at Mr. Haveles' first suggestion to somehow do the
16 numbers, and I don't disagree with anything he has just said.
17 And I do think the fuller list really does put a point on the
18 act of what we are doing, which is -- if they said, what
19 documents should we look to to determine liability, clearly we
20 can't do that. This is asking for how do we decide damages.
21 And that's what exactly the question is asking for and that was
22 the task of counsel through the trial, but certainly during
23 closing argument which, again, there are no complaints of
24 insufficient time since I gave you all the time you asked for.

25 It goes too far. And when they ask for specific

1 exhibits, we can give that and that's what we have done so far.
2 They are not asking for that. They may be asking for actual
3 numbers, but even interpreting it more appropriately, they are
4 asking for a summation of documents, an organization of
5 documents and presumably testimony. There was testimony that
6 goes to these matters as well and it invades the jury's
7 process.

8 MR. S. STIRLING: Very well, your Honor. Do I
9 understand that the proposal now then, putting aside what I had
10 suggested, would be to remind them that yesterday they asked
11 these questions and we had referred them to the exhibits that
12 we had identified yesterday that included some of this
13 information, 2090, 2792, et cetera, those that were identified
14 yesterday?

15 MR. HAVELES: I don't think we can do that, your
16 Honor. That crosses the line. That's an issue that you must
17 decide based on the evidence you have heard and received.

18 THE COURT: Here is what I think is appropriate, some
19 version of this. I think it wouldn't be useful to them to say
20 what we referred you to yesterday has some of that information.
21 Either referring to it them yesterday gave them sufficient
22 information or it didn't. And then the process of telling you,
23 we told you some of this is doing that work.

24 I think what we can do is, in a sense, invite them to
25 ask if there are specific exhibits that they want or specific

1 testimony. But to the extent that they are asking us for what
2 documents or evidence they should use to come to a particular
3 conclusion on a question, that we cannot do. That is their
4 task based on everything that's been presented to them.

5 MR. S. STIRLING: I do think, your Honor, it would be
6 appropriate and not out of line to tell them that they had
7 asked a question yesterday relating to this subject that we had
8 identified those exhibits for them and that we cannot provide
9 them --

10 THE COURT: I am not going to do that. It's just a
11 version of the same thing, as I think you recognize.

12 Because there are steps involved here. There is
13 pulling together different aspects of different pieces of
14 evidence. If it were just arithmetic, if it were just clear
15 that they had in mind some set of exhibits and they just don't
16 remember what the exhibit numbers were or some testimony and
17 they can't identify exactly what, we would know with some
18 confidence that they have done the fact-finding analysis
19 themselves and they are just looking for the piece of paper
20 that get that. To the extent that they need more, it's too
21 late, or at least I am not, through me, going to summarize or
22 describe the testimony. I have no basis for thinking that's
23 appropriate.

24 I'm just working on specific language.

25 Here is what I propose. After reading the question

1 I'll say: The fact-finding task for you in this question that
2 you are asking about is to come to conclusions based on the
3 evidence to determine what amounts for each of these defendants
4 has been proven. If there are specific documents you have in
5 mind or specific testimony that you are seeking, I will gladly
6 provide it. But what I can't do is invade your role by
7 determining what information you need in order to make your
8 fact conclusions.

9 MR. S. STIRLING: Your Honor, respectfully, I think
10 agreed facts in the joint pretrial report stand to a different
11 footing than other evidence.

12 THE COURT: You mean the stipulated-to facts.

13 MR. S. STIRLING: Yes, the stipulated-facts in the
14 joint pretrial report I think stand on a different footing than
15 other evidence and it is appropriate, at a minimum, to refer
16 the jury to stipulated facts that are not contested in this
17 case.

18 MR. HAVELES: We strongly disagree, your Honor. The
19 charge that you read yesterday, to which Mr. Stirling never
20 objected, said the stipulated facts are just amongst all the
21 other evidence and was not entitled to any different treatment.
22 It was one of a series of things and that's not to be
23 highlighted or given special distinction as opposed to
24 something else, and that was explicitly in the charge that your
25 Honor read at the conclusion of the charges yesterday morning.

1 THE COURT: I think, again, Mr. Stirling, it's just a
2 version of the same thing. And they asked for nine copies of
3 the stipulated facts yesterday. So I feel quite confident, if
4 that's what they are looking for, based on their doing their
5 job, which is not my job to take over, then they have it.

6 Anything else with respect to what I propose?

7 MR. S. STIRLING: No, your Honor.

8 THE COURT: Mr. Haveles.

9 MR. HAVELES: I would just recommend findings instead
10 of conclusions at the end of your statement, your Honor.

11 THE COURT: And I used the word earlier as well. I
12 said to come to conclusions. I'll say to come to findings.
13 And then at the end, fact findings.

14 MR. HAVELES: Yes, your Honor. Otherwise, we have no
15 other comments on the proposed response.

16 THE COURT: Will you get the jury.

17 (Jury present)

18 THE COURT: Everyone may be seated.

19 Good afternoon, members of the jury. I did receive a
20 note which says: In order to answer No. 6, we need to know the
21 total amount received for A through G and then listing as A
22 through G Renco Group, Ira Rennert, Legge, Thayer, Ogaard,
23 Brown, and Kaplan. And then you also say: Plus new paper,
24 please, and thank you.

25 New paper we can do and that will be sent back to you

1 in a moment.

2 On the first question here is the response I have:
3 Part of your fact-finding task for this question is to come to
4 findings, come to your findings based on the evidence to
5 determine what amounts for each of those defendants has been
6 proved. If there are specific documents you have in mind or
7 specific testimony, I will gladly provide it, but what I can't
8 do is invade your role by determining what information you need
9 in order to make your fact findings.

10 That's the response I can give you. We will send you
11 back with paper in hand. Thank you very much.

12 (Jury deliberations resumed; time noted 12:23 p.m.)

13 THE COURT: Anything else?

14 MR. HAVELES: Not now, your Honor.

15 Luncheon recess in 10 minutes?

16 THE COURT: Luncheon recess in 10 minutes.

17 MR. HAVELES: We will keep it wicked short, your
18 Honor.

19 THE COURT: Certainly take 40 minutes. I think we
20 have that. And everybody needs a break.

21 Just to plant the seed, in case it hasn't occurred to
22 you, you should be thinking about settlement talks and let me
23 know if you need anything from the Court.

24 MR. HAVELES: Thank you, your Honor.

25 (Recess pending verdict)

1 THE COURT: We have a note. It says: Which
2 documents -- something -- I cannot read the word. Which
3 documents something colon, Ogaard colon, quote, we urge extreme
4 caution CapEx and negative cash drain, end quote. Thank you.

5 MR. HAVELES: I think I understand.

6 THE COURT: It's clear what they are looking for, I
7 think.

8 MR. HAVELES: They are asking for -- I think it's
9 which document is or some verb that just says what is the
10 document that has that statement in it.

11 THE COURT: I totally agree. For purposes of reading
12 the note I am not sure what the word is, but they are looking
13 for a document which they are attributing to Mr. Ogaard with
14 something along the lines of, we urge extreme caution, CapEx
15 and negative cash drain.

16 MR. HAVELES: We can identify that. May Mr. Stirling
17 and I look at the note and see if we can translate the writing.
18 Since my handwriting is notoriously bad, I'm good at
19 interpreting bad handwriting.

20 THE COURT: It could be asked, but it doesn't make a
21 lot of sense.

22 MR. HAVELES: Looks like ask, your Honor. An
23 ungrammatical sentence, but I think that's what they are doing.

24 We are looking to get the document number. We know
25 which one it is, but I want to get the right document.

1 MR. S. STIRLING: Your Honor, I'm pointing out it is
2 documents plural and I believe there are two of them.

3 MR. HAVELES: We are looking for them.

4 MR. S. STIRLING: We think those are Exhibits 2549 and
5 2716.

6 MR. HAVELES: Your Honor, we are identifying -- if we
7 can look at the documents, if you can give us one minute to
8 pull them and examine them.

9 THE COURT: You can both identify what you think is
10 responsive and then let me know.

11 I think I didn't say this. This note will be marked
12 as Court Exhibit 17.

13 MR. HAVELES: Your Honor, we believe the only exhibit
14 is 2549. That is the only document that uses the phrase
15 extreme caution. The language is materially different between
16 it and 2716, the other document that Mr. Stirling identified.
17 I'm happy to hand up the two copies to your Honor.

18 THE COURT: Sure.

19 MR. R. STIRLING: Your Honor, if I may read from
20 Exhibit 2716.

21 MR. HAVELES: The top one, your Honor, 2716 --

22 THE COURT: There is no disagreement that 2549 is
23 responsive, correct?

24 MR. S. STIRLING: Correct.

25 MR. HAVELES: Your Honor, I think it's actually the

1 other way around. It's 2716 that uses the extreme caution.

2 It's 2549 that has different language.

3 THE COURT: Would you say if it uses, we urge extreme
4 caution, is that responsive?

5 MR. HAVELES: I misheard it. My eyes are failing me
6 and my glasses are dirty.

7 THE COURT: 2716. Do you want to look at them again.
8 They both use that language.

9 MR. HAVELES: If I may, your Honor.

10 THE COURT: Sure.

11 MR. HAVELES: Thank you.

12 I stand corrected, your Honor, even with my dirty
13 glasses. Thank you.

14 THE COURT: So everybody agrees 2549 and 2716 are
15 responsive?

16 MR. HAVELES: Yes, your Honor.

17 MR. S. STIRLING: Yes, your Honor.

18 THE COURT: Bring them out and I'll give them those
19 numbers.

20 (Jury present)

21 THE COURT: Thank you, members of the jury. I have a
22 note from you which says: Which documents -- I think the next
23 word is ask -- Ogaard, quote, we urge extreme caution CapEx and
24 negative cash drain. Thank you.

25 And the exhibits that I can point you to that I

1 believe you are asking for with that language are 2549 and
2 2716.

3 Thank you very much.

4 (Jury deliberations resumed; time noted 1:20 p.m.)

5 THE COURT: Anything to take up?

6 MR. HAVELES: No.

7 THE COURT: We will wait to hear from the jury. Thank
8 you.

9 (Recess pending verdict)

10 THE COURT: We have a note which I will mark as Court
11 Exhibit 18. It says: Testimony of Roger Fay, please. You'll
12 gather the direct.

13 MR. HAVELES: The entirety of the testimony, your
14 Honor?

15 THE COURT: Yes.

16 MR. HAVELES: We can do that. It will take us about
17 10 minutes just to process it and get it printed out, if your
18 Honor can give us that indulgence.

19 THE COURT: Of course.

20 MR. HAVELES: We need to also then go through it and
21 redact it for any objections that were sustained. I don't
22 believe any testimony was stricken from Mr. Fay.

23 THE COURT: If you would pull what you think, maybe
24 just working together redact, and if there is any dispute you
25 will let me know. Otherwise, I'll come back in about 10

1 minutes, unless you indicate you are ready sooner and we will
2 get that in to them.

3 MR. HAVELES: Ten minutes should probably be able to
4 do it. Mr. Fuisz promised me he knows how to print now. If he
5 is true to his word, we will be able to do it very quickly.

6 THE COURT: Thank you.

7 (Recess pending verdict)

8 MR. HAVELES: Your Honor, we have gone through the
9 testimony. Mr. Stirling and I reviewed it.

10 For the record, Mr. Fuisz doesn't get any credit.
11 Mr. Langsdorf preprinted all the witness testimony last night
12 for every witness in anticipation of such a request. As our
13 case manager, he gets much kudos.

14 THE COURT: Well done.

15 MR. HAVELES: That's basically Mr. Stirling and I
16 jointly went through it all. We are in agreement that this is
17 the testimony we have extracted, three pages that was pure
18 colloquy amongst the parties during a break about some
19 exhibits. In terms of what should be admitted or not and
20 everything else, your Honor, has been redacted for the
21 objections and the colloquy that may have occurred in
22 connection with that.

23 THE COURT: Mr. Stirling, do you agree?

24 MR. S. STIRLING: Yes.

25 THE COURT: One thought. Just the first page of it,

1 at the top is marked Veranth recross. I think my suggestion
2 would be to redact that.

3 MR. HAVELES: That's the running header from the court
4 reporter. I will do that right now, your Honor.

5 THE COURT: Thank you. Unless anyone objects, my
6 suggestion would be to simply send this back, since it was very
7 clear what was being asked for, rather than bringing them out.

8 Everyone comfortable?

9 MR. S. STIRLING: Yes, your Honor.

10 MR. HAVELES: Yes, your Honor.

11 THE COURT: With your agreement as to this, we will
12 send back in response to their request for the testimony of Mr.
13 Fay what you have gathered.

14 Thank you. We will wait to hear from the jury.

15 (Recess pending verdict)

16 THE COURT: I have a note which we will mark as Court
17 Exhibit 19. It says: Unfortunately, we cannot agree on No. 1
18 and therefore we are hung. I'm sorry.

19 I would propose a deadlock charge. I would propose an
20 Allen charge along the following lines. I'm happy to hear your
21 suggestions.

22 I received a note indicating that you've not been able
23 to reach a unanimous verdict as to all questions. This is not
24 unusual with juries. The case is important for the plaintiff
25 and for the defendants. Both parties, as well as the Court,

1 have expended a great deal of time, effort, and resources in
2 seeking a resolution of this dispute. It is desirable if a
3 verdict can be reached that this be done, both from the
4 viewpoint of the plaintiff and of the defendants'. But as I
5 stated in my instructions to you, your verdict must represent
6 the conscientious judgment of each juror.

7 It's normal for jurors to have differences. This is
8 quite common. While you may have honest differences of opinion
9 with your fellow jurors during your deliberations, each of you
10 should seriously consider the arguments and opinions of the
11 other jurors. Do not hesitate to change your opinion if after
12 discussion of the issues and consideration of the facts and
13 evidence in this case you are persuaded that a change of your
14 original opinion is justified. Again, I emphasize that no
15 juror should vote for a verdict unless it represents his
16 conscientious judgment.

17 MR. HAVELES: I am just trying to formulate one idea
18 in my head, if you can give me 20 seconds or 30 seconds, your
19 Honor.

20 THE COURT: Take your time.

21 Mr. Stirling, are you close?

22 MR. S. STIRLING: Close, your Honor.

23 THE COURT: Take some more time. I can hear from you
24 first or I can hear from Mr. Haveles.

25 Go ahead, Mr. Haveles.

1 MR. HAVELES: Your Honor, this note from the jury is
2 not the first such note that we received from the jury. Last
3 night, when they were asking to go home to have a chance to
4 refresh themselves, they specifically advised Court they are at
5 an impasse.

6 THE COURT: Temporarily they said.

7 MR. HAVELES: I understand. This is now a second,
8 more dramatic impasse and I think this is a jury that we have
9 seen right out of the box, went right to work and tried to deal
10 with issues.

11 THE COURT: I am not going to not give an Allen
12 charge.

13 MR. HAVELES: I understand. But I would still like to
14 make my record, if I may, your Honor.

15 I believe, under the circumstances, that the Allen
16 charge, as opposed to declaring a mistrial at this time, is
17 unnecessary, in light of the record of the jury's deliberation
18 and notes, and first would request and object to the giving of
19 a charge as opposed to declaring a mistrial at this time.

20 THE COURT: Do you have any support for the notion
21 that based on this a mistrial would be appropriate? Noting, by
22 the way, it is conceivable that even if they were render a
23 partial verdict here, they may have answered yes on question 2
24 and question 3 or question 3, which you can make whatever
25 arguments you made, but I think as a logical matter we are in

1 the same place as if they answered 1.

2 MR. HAVELES: I understand, your Honor. The
3 instructions were clear that they could answer any of the
4 three, and they have come back and they have told you that they
5 are hung. Do I have case law here with me, your Honor, about
6 mistrials? No. I'm just arguing from the record that's been
7 established.

8 THE COURT: I think in response to that that every
9 indication I've seen from this jury, based on their attention
10 throughout trial, their questions, their following of
11 directions, that I'm not in any way certain that they won't
12 come to a unanimous verdict with a reminder that they should
13 keep deliberating and be open while maintaining their
14 consciously-held views.

15 MR. HAVELES: To the extent I infer from your Honor's
16 comments that you have denied my application, then I would
17 request additional language be added to the instruction.

18 Your Honor, the problem with an Allen charge always is
19 to try to find a balance where it doesn't seem coercive. I
20 know your Honor has attempted that with it twice saying, you
21 don't -- the last sentence, which is a repetition, and
22 unfortunately it's not in front of the screen, so I can't
23 repeat it verbatim, the advice that you tell the jury that they
24 can still make -- Mr. Fuisz is scrolling for me.

25 THE COURT: On the repetition point -- let me finish,

1 Mr. Haveles.

2 MR. HAVELES: I apologize, your Honor.

3 THE COURT: As a general matter I try not to talk on
4 top of you, just because that is a problem for the record. You
5 know, stopping speaking when the judge is talking is not an
6 unheard-of matter of courtroom behavior.

7 MR. HAVELES: I understand that, your Honor.

8 THE COURT: Thank you. And even if it weren't, I try
9 to stop talking when you are talking.

10 In adding the sentence that I did at the beginning, I
11 think I did introduce a repetition, although I don't think it's
12 the repetition -- I am just taking the standard deadlocked
13 charge from Model Jury Instructions. And I was conforming it a
14 little bit to another one that I had, and I think I did
15 introduce a repetition, but not the one that you had.

16 Let me just read again what I would propose: I have
17 received a note indicating that you have not been able to reach
18 a unanimous verdict with respect to all questions. I will say
19 that this case is important for the plaintiff and for the
20 defendants. Both parties, as well as the Court, have expended
21 a great deal of time, effort, and resources seeking a
22 resolution of this dispute. It is desirable if a verdict can
23 be reached that this be done, both from the viewpoint of the
24 plaintiff and of the defendants. But as I stated in my
25 instructions to you, your verdict must represent the

1 conscientious judgment of each juror.

2 It is normal for jurors to have differences. This is
3 quite common. While you may have honest differences of opinion
4 with your fellow jurors during the deliberations, each of you
5 should seriously consider the arguments and opinions of the
6 other jurors. Do not hesitate to change your opinion if, after
7 discussion of the issues and consideration of the facts and
8 evidence in this case, you are persuaded that a change of your
9 original opinion is justified. Again, I emphasize that no
10 juror should vote for a verdict unless it represents his
11 conscientious judgment.

12 MR. HAVELES: In lieu of the last sentence, your
13 Honor, we believe to avoid the coercive effect that Allen
14 charges have that courts try to avoid them having, we would
15 propose the following sentence be placed instead of the last
16 sentence: You should not feel compelled to change your
17 judgment simply to reach a verdict unless you believe in the
18 exercise of your judgment it is correct.

19 THE COURT: Mr. Stirling.

20 MR. S. STIRLING: Your Honor, I don't see how that is
21 any improvement on the last sentence that you had proposed. It
22 seems to be, as you suggested, it isn't obvious from this note
23 that the jury has even reached or whether they are hung on
24 questions 2 or 3 or whether they have gone, which would permit
25 them to go on to question 7 and subsequent parts as to which

1 they may have reached agreement, or may not be hung, at any
2 rate. And I believe that may not be clear to them and I think
3 it may be appropriate to remind them to read the instructions
4 that they have, to make that clear to them that they can go
5 on --

6 THE COURT: No, I won't do that, at least not yet. We
7 can talk about a partial verdict of some kind, but they have
8 been instructed to come to a unanimous decision on all
9 instructions that they were directed to, unless told to skip.
10 And the verdict form, approved by everyone, without any
11 objection to this, I don't think suggests that they can skip
12 question 1 by answering question 2 or question 3. I am not
13 going to change midstream the verdict form that everyone
14 consented to, unless I am forgetting something about the
15 verdict form.

16 MR. S. STIRLING: Your Honor, I don't believe it does
17 require them to do that. At the end of question 1 it says:
18 Proceed to question 2.

19 THE COURT: Yes. And my instructions were that they
20 have to answer any questions unless they were told that they
21 could skip any as a result of other answers. So what you are
22 suggesting might have been a good idea at the time of the
23 charging conference, and we can talk about it down the road if,
24 in fact, it turns out that they will be deadlocked, although I
25 remain fairly optimistic that won't be the case.

1 In any event, I'm not going to change the directions
2 now.

3 MR. S. STIRLING: Your Honor, but on page 5 of the
4 jury verdict form it says: If you answered no to every part of
5 question 1, every part of question 2, and every part of
6 question 3, skip to question 7.

7 THE COURT: That doesn't help you.

8 MR. S. STIRLING: Just a moment, your Honor, if you
9 would.

10 THE COURT: I am going to give a standard
11 run-of-the-mill balanced Allen charge. There is just nothing
12 here at this point. This was a trial that lasted three and a
13 half weeks. They have been deliberating for not even a full
14 two days. So everybody, calm down. We are not close to the
15 doomsday scenario. There is a lot to be done, including just
16 telling them, without abandoning their beliefs, to see if they
17 can come to a consensus.

18 No, Mr. Stirling. Not yet. I'll hear you.

19 MR. S. STIRLING: Actually, I agree with you on that,
20 your Honor.

21 I did want to point out that instruction No. 7
22 concludes on page 11. What the jury was told was:
23 Accordingly, you need to find by a preponderance of the
24 evidence that only one of these three types of transfers has
25 occurred in order to find for the plaintiff.

1 THE COURT: That is true.

2 MR. S. STIRLING: You do not need to find that all
3 three types of transfers occurred.

4 THE COURT: That is very true. But I told them that
5 they had to answer every question on the verdict form unless
6 they were specifically told to skip as a result of other
7 conclusions. So, again, if you had brought this point up at
8 the charging conference, we may have done something different
9 and there may be something different to do down the road, but I
10 am not going to do that now and I'm happy to hear it after I
11 give a charge.

12 Mr. Haveles, I am not going to accept your sentence.
13 I didn't think it improved on the Modern Federal Jury
14 Instructions standard charge. But I think your preliminary
15 point was the repetition of the reminder that you don't want me
16 to tell them that your verdict must represent the conscious
17 judgment of each juror?

18 MR. HAVELES: No, your Honor. I was going to be
19 making two points. The first is, although you had made that
20 point twice, I didn't think that was enough to balance out the
21 fact that twice you told them that they should try to reach a
22 verdict.

23 THE COURT: Two times of each. Is it balanced?

24 MR. HAVELES: I think the fact that the other was much
25 longer and there is a very short sentence to simply say, you

1 should follow your conscience wasn't sufficient and that's why
2 I changed the language to say, you are not compelled. Your
3 Honor, I think that was really the concern that I was trying to
4 express by the additional language. It was to balance things
5 out so it didn't look like they were being told they must reach
6 a verdict.

7 THE COURT: I think that's exactly the point of the
8 charge. And ending with the sentence that I emphasized that no
9 juror should vote for a verdict unless it represents his or her
10 conscientious judgment does precisely what you are asking for,
11 and I'm taking that language from the standard charge listed in
12 Modern Federal Jury Instructions from Lexis, indicating as in
13 all circuits except the District of Columbia. And I do think
14 the fact that it makes both points twice and certainly
15 doesn't -- we can talk about, if we get to the point of needing
16 another charge, what additional language to add, but I think
17 this is quite standard and appropriate under all the
18 circumstances.

19 We will get the jury.

20 Let me say, and we will pause before they come in, I
21 should also end with something like: Please continue your
22 process of deliberation, just to make clear what I'm asking
23 them to do. Okay?

24 MR. HAVELES: Yes, your Honor.

25 THE COURT: Okay, Mr. Stirling?

1 MR. S. STIRLING: Yes, your Honor.

2 (Jury present)

3 THE COURT: Thank you, members of the jury. I
4 received a note which reads: Unfortunately, we cannot agree on
5 No. 1 and, therefore, we are hung. I'm sorry.

6 So I did receive that note and let me give you my
7 instruction. I have received that note from you, that you have
8 not been able to reach a unanimous verdict with respect to all
9 questions. This case is important for the plaintiff and for
10 the defendants. Both parties, as well as the Court, have
11 expended a great deal of time, effort, and resources in seeking
12 a resolution of this dispute. It is desirable if a verdict can
13 be reached that this be done, both from the viewpoint of the
14 plaintiff and of the defendants. But as I stated in my
15 instructions to you, your verdict must represent the
16 conscientious judgment of each juror.

17 It is normal for jurors to have differences. This is
18 quite common. While you may have honest differences of opinion
19 with your fellow jurors during the deliberations, each of you
20 should seriously consider the arguments and opinions of the
21 other jurors. Do not hesitate to change your opinion if after
22 discussion of the issues and consideration of the facts and
23 evidence in this case you are persuaded that a change of your
24 original opinion is justified. Again, I emphasize that no
25 juror should vote for a verdict unless it represents his or her

1 conscientious judgment.

2 With that instruction in mind, I'll ask you to please
3 continue your process of deliberation. Thank you very much.

4 (Jury deliberations resumed; time noted: 3:40 p.m.)

5 THE COURT: That note, as I said, we have marked as
6 Court Exhibit 19.

7 Anything else?

8 MR. HAVELES: No, your Honor.

9 MR. S. STIRLING: Nothing, your Honor.

10 THE COURT: I do think spend your time thinking
11 through your proposals for the contingency of another
12 deadlocked note. I'm happy to hear those and it's a good use
13 of this time to plan for that contingency. As I said, I remain
14 optimistic. It was a long trial, obviously, a lot of
15 information, complicated instructions. They have been working
16 very hard, asking for a lot of information. And they have only
17 been deliberating -- I think it went to them yesterday at about
18 11:30 in the morning and they put out a note asking to stop at
19 about 4:30, 4:45, and then started today, I think all of the
20 jurors came in, we brought them in a little bit before 10 to
21 give them the materials and it's 3:40 now, having received that
22 note about 15 minutes ago.

23 In the scheme of length of deliberations, especially
24 compared with the length of trial and complexity of trial, very
25 early. So for that reason I do remain optimistic, but I also

1 have every confidence that they are following the instructions,
2 including the instruction not to abandon their conscientious
3 view.

4 We will wait to hear from the jury. Thank you.

5 (Recess pending verdict)

6 THE COURT: I have a note which I will mark Court
7 Exhibit 20. It says: We need a break from the room. One
8 juror is having a panic attack.

9 My suggestion is to bring them in, take a 10-minute
10 break, come back in 10 minutes. If they want to break until
11 the morning, they should bring out a note. If they want to
12 continue, they should continue. I want to give them a break
13 since somebody is uncomfortable. We will go get them.

14 MR. PARK: Your Honor, on reflection I'm concerned
15 about that note.

16 THE COURT: We will talk about it after the jury comes
17 in. Here they come.

18 (Jury present)

19 THE COURT: I got a note that we need a break from the
20 room. One juror is having a panic attack. I certainly want to
21 give you a break.

22 Here is what I'm going to suggest or do. Take a
23 10-minute break. It's 4:20 now. Come back at about 4:35. If
24 what you decide is you want to stop for the day once you come
25 back from the break, send out a note that you want to stop for

1 the day. If you decide you want to keep going, just send out a
2 note whenever you want to stop. Let's do that. But go back,
3 get your coats, whatever you want, walk around and just come
4 back in about 10 minutes and make a decision as to whether you
5 want to continue today or continue in the morning. Thank you
6 very much.

7 (Jury deliberations resumed; time noted 4:22 p.m.)

8 THE COURT: Mr. Park.

9 MR. PARK: Your Honor, for a juror to express that
10 they are having a panic attack --

11 THE COURT: Not that unusual.

12 MR. PARK: In my experience, I have never received a
13 note like that in the years that I've been doing trials in this
14 courthouse.

15 THE COURT: Basically the same note happened I think
16 like two months ago. Just with that background in mind, I'm
17 open to whatever it is you want to suggest.

18 MR. PARK: We renew our motion for a mistrial.

19 THE COURT: Denied.

20 Anything else?

21 MR. S. STIRLING: Nothing here, your Honor.

22 THE COURT: We will see what they say in terms of
23 continuing today or not. And you are thinking through
24 contingencies if we were to receive another note indicating an
25 impasse and the like.

1 We will come back in 10. Thank you.

2 (Recess pending verdict)

3 THE COURT: I have a note which we will mark as 21.

4 We can work until 5. May we leave and return tomorrow.

5 I interpret that to mean we can work until 5, but they
6 assume they will need to keep going tomorrow. What I would
7 suggest is that I bring them back out just a couple of minutes
8 before 5 and send them home with my thanks for their continuing
9 efforts and reminding them of my instructions and have them
10 return at 9:30. Okay?

11 MR. HAVELES: Yes, your Honor.

12 MR. S. STIRLING: Very good.

13 THE COURT: I'll come back in a few minutes before 5.

14 Thank you.

15 (Recess pending verdict)

16 THE COURT: Counsel, anything to take up before we
17 bring in the jury and send them home for the night?

18 MR. HAVELES: No, your Honor.

19 MR. S. STIRLING: Nothing here, your Honor.

20 THE COURT: I'll do that. I do plan to just say that
21 I know they have been working hard and it's a small room with
22 no windows and they have been there all day. So I'm grateful
23 for their efforts and thank them, hope that they get a good
24 break and a good night's sleep, and to return tomorrow morning
25 at 9:30.

1 I will tell them I am going to have breakfast brought
2 in for them tomorrow.

3 (Jury present)

4 THE COURT: Thank you so much, members of the jury. I
5 did get your note saying that we can work until 5 and then may
6 we leave and return tomorrow. Yes, of course.

7 And I just want to say that I'm very grateful. I know
8 you are working hard. I know it's a small room with no windows
9 and you were in there all day. I'm just enormously grateful
10 for your efforts and your diligence.

11 I will send you home. I do want to remind you of my
12 instructions. No communications with anyone about the case
13 through any means, no research about the case through any
14 means. And included in that is that if you were to come across
15 something inadvertently about the case, put it aside. Don't
16 look at it or listen to it. Because everything you need to
17 know about the case is what was admitted in evidence.

18 Same procedure as this morning. Please be in the jury
19 room and ready to go by 9:30. Please wait for all of you to be
20 there to start your deliberations. That is important.

21 I am going to have breakfast, the hot breakfast
22 brought in again like we did a week or two ago. We have your
23 orders from last time. So we will order you what you had last
24 time and have that waiting for you beginning at 9 tomorrow.

25 I wish you a good break, a good night's sleep and

1 thank you so much. We will see you tomorrow.

2 (Jury not present)

3 THE COURT: Anything to take up, counsel?

4 MR. HAVELES: Not on this side, your Honor.

5 THE COURT: Mr. Stirling.

6 MR. S. STIRLING: No, your Honor.

7 THE COURT: See you tomorrow. Thank you.

8 (Adjourned to Friday, February 27, 2015, at 9:30 a.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25